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NO. 57869-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID McALLISTER and KEN McALLISTER
Appellants

vs.

CITY OF BELLEVUE FIREMEN'S PENSION BOARD
Respondent

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 AUG 28 PM 3:38

**RESPONSE BRIEF OF CITY OF BELLEVUE
FIREMEN'S PENSION BOARD**

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I. INTRODUCTION

Appellants David and Ken McAllister (“McAllisters”) challenge the City of Bellevue Firemen’s Pension Board (“Board”) decision reducing their pension benefits prospectively. The McAllisters had been receiving a higher pension than provided by statute. In an administrative appeal before the Firemen’s Pension Board, the McAllisters sought to overturn the earlier Board decision. In their administrative appeal, the McAllisters erroneously mixed the Board’s responsibilities to calculate a pension using a formula set forth in the 1955 Firemen’s Pension Act, (RCW 41.18) [“55 Act”] with the contributions to and benefits received under the successor state-wide Law Enforcement Officers and Fire Fighters Retirement system (“LEOFF”) administered by the Department of Retirement Systems (“DRS”).

As retirees under LEOFF, the McAllisters are entitled to a pension as defined by that statute. Since Appellants had previously contributed to the 55 Act before the enactment of LEOFF on March 1, 1970, the McAllisters are also entitled to an Excess Calculation and Payment (“LEOFF Excess Payment”). This Excess Payment is based on a calculation of what Appellants would have been entitled to receive under the 55 Act had they remained members of that retirement system.

Unfortunately, for a number of years, the Board calculated the McAllisters' pension under the 55 Act at 50 percent of the rank from which they retired even though the 55 Act definition of *basic salary* requires that the 55 Act pension calculation is capped at 50 percent of the current battalion chief salary. In a failed attempt to preserve the erroneously applied, though more favorable, pension formula, the McAllisters seek to borrow a definition of *basic salary* only applicable under LEOFF and to engraft the LEOFF definition onto the formula set forth in the 55 Act. Applicable legal principles do not support this outcome.

The Board correctly rejected the McAllisters' arguments. LEOFF did not modify the 55 Act pension calculation formula for LEOFF members retiring from a rank higher than battalion chief. Specifically, LEOFF's own definition of *basic salary*, which is not capped at a battalion chief salary, has no legal effect on the *basic salary* definition under the 55 Act and therefore had no impact on the Board's calculation of a pension due a LEOFF retiree under the 55 Act pension formula.

Further, the Board also correctly rejected the McAllisters' argument relying on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). *Bakenhus* protects a public employee's pension in effect at the time of hire from later legislation that impairs the pensioner's vested

rights. Appellants claim that the later enacted LEOFF pension scheme is constitutional but that the Board's calculation of Appellants' pension under the 55 Act is unconstitutional. With Appellants' concession that LEOFF is constitutional, the McAllisters have abandoned any argument of error on appeal since *Bakenhus* is only applicable to invalidate a later piece of legislation impairing rights under earlier legislation. Further, if Appellants are claiming that LEOFF could not constitutionally require a greater contribution to the LEOFF pension fund than they paid under the prior 55 Act, than the remedy cannot be that the Board must pay the McAllisters a greater sum than required under the law.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The City of Bellevue Firemen's Pension Board correctly denied the appeal of David and Ken McAllister.
- B. The City of Bellevue's Firemen's Pension Board correctly concluded that the LEOFF Act did not repeal the battalion chief cap on *basic salary* as set forth in the 55 Act.
- C. The City of Bellevue Firemen's Pension Board correctly concluded that it was not error to reduce the excess pension benefits of David and Ken McAllister to conform to the definition of *basic salary* (capped at battalion chief) under the 55 Act.
- D. LEOFF and the 55 Act are separate pension plans not in effect at the same time and therefore they do not have to be reconciled.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. If LEOFF is constitutional, then the McAllisters have abandoned any claim of error because RCW 41.26.040(2) requires the Board calculate the McAllisters' pensions using the definition of *basic salary* under the 55 Act.
- B. LEOFF complies with *Bakenhus* principles under RCW 41.26.040(2) by preserving the McAllisters' rights to a pension that is at least as great as they would have received if LEOFF had not been enacted. *Bakenhus* does not create an obligation on the Board to pay a higher pension than is required under the 55 Act simply because LEOFF, for its own pension calculation purposes, removes the battalion chief salary cap on contributions and benefits in providing a state paid pension plan.
- C. The LEOFF legislation enacted in 1969, but amended before its enactment on March 1, 1970, did not alter the McAllisters' benefits as calculated under the LEOFF Excess Payment.
- D. After March 1, 1970, the McAllisters were members of only the LEOFF pension plan.

IV. COUNTER STATEMENT OF THE CASE

A. Employment/Retirement of the McAllisters

David McAllister began his employment with the Bellevue Fire Department in 1965.¹ CABR, HE G-04-01-1615. He retired from the Bellevue Fire Department in February 1975 at the rank of Fire Chief.

¹ These cited references are to the underlying administrative record. They refer to the Bates stamped number on the bottom of each document noted as "McAllister Appeal HE G-04-01-0000." For ease of clarity, the administrative record, henceforth, will be referred to only by HE and the four last digits.

CABR, HE 1615. Ken McAllister began his employment with the Bellevue Fire Department in 1965 as a fire fighter. CABR, HE 1617. He became a battalion chief on January 1, 1970 and retired from the Bellevue Fire Department in May of 1983 at the rank of Deputy Chief. CABR, HE 1617. The McAllisters have been receiving disability pension benefits since 1975 and 1983 respectively. CABR, HE 1615, 1617.

B. Pension Membership

Prior to March 1970, the McAllisters contributed to the 55 Act pension plan pursuant to RCW 41.18. The Board administered this plan and contributions were made into a City fund – the Firemen’s Pension Fund (“Fund”). Prior to March 1, 1970 and pursuant to RCW 41.18.030, Appellants contributed 6 percent of their basic salary up to the cap of the battalion chief salary to the Fund. The McAllisters are not claiming on appeal that Appellants paid greater contributions into the Fund than was required by RCW 41.18.030.

On March 1, 1970, with the effective date of LEOFF, active fire fighters who contributed to the 55 Act had their pension membership transferred to LEOFF. RCW 41.26.040(1). Fire fighters became members of the LEOFF system “to the exclusion of any pension system existing under any prior act.” RCW 41.26.040(1). When Appellants’ retirement plan memberships were transferred to LEOFF on March 1, 1970, they

began contributing 6 percent of their *basic salary* as defined under the LEOFF statute to the State. RCW 41.26.080(2). LEOFF's 6 percent contribution rate is not capped at the battalion chief salary. RCW 41.26.080(2). Correspondingly, LEOFF disability retirement benefits paid by the state are not capped at a percent of a battalion chief's salary. RCW 41.26.420. The McAllisters have not claimed that the City did not forward to LEOFF contributions called for under LEOFF.

As of March 1, 1970 active fire fighters were no longer members of the 55 Act pension plan and could only retire under the LEOFF system. RCW 41.26.040(1). (A firefighter who retired prior to March 1, 1970 retained his membership under the 55 Act and was paid retirement benefits solely from the Fund.) With the enactment of LEOFF, the City retained the Firemen's Pension Fund and paid out benefits to those who retired before March 1, 1970, as well as paying benefits to later LEOFF retirees based on the calculation required under RCW 41.26.040(2), as described below.

While the McAllisters did not retain membership in the 55 Act plan after March 1, 1970, certain provisions of the 55 Act were incorporated into LEOFF to address the rights of fire fighters who had made contributions under the 55 Act. RCW 41.26.040(2) provides that a LEOFF retiree who had contributed to the 55 Act is entitled to have his

former employer calculate what he would have received under the 55 Act and compare that to the State paid LEOFF retirement benefit. (Under the provisions of LEOFF, a retiree's benefits are calculated based on a percentage of the employee's salary, without a cap. RCW 41.26.420.) Pursuant to the provisions of RCW 41.26.040(2), if the State paid LEOFF benefit is less than what the fire fighter would have received under the 55 Act, the former employer (in this case the City of Bellevue) pays the retiree the difference (i.e., the LEOFF Excess Payment) from the Firemen's Pension Fund.

The LEOFF Excess Payment is calculated using the definitions and conditions of the prior retirement act to which the McAllisters were making contributions at the time their membership transferred to LEOFF. RCW 41.26.040(2). The McAllisters were members of the 55 Act prior to March 1, 1970. The 55 Act disability benefit computation is defined as 50 percent of *basic salary* pursuant to RCW 41.18.060. The definition of *basic salary* under the 55 Act is deemed not to exceed the salary of a battalion chief. RCW 41.18.010(4). (The contribution rate under the 55 Act is also capped at 6 percent of *basic salary*, i.e. no more than 6 percent of the salary of a battalion chief.) RCW 41.18.030.

Both Appellants were members of the LEOFF retirement system at the time of their retirements. RCW 41.26.040(1). The McAllisters retired

at a higher rank than battalion chief. CABR, HE 1615, 1617. Therefore, under RCW 41.26.040(2), Appellants' LEOFF Excess Payment should have been capped at 50 percent of the salary of a battalion chief. From the date of each of the McAllisters' respective retirements until January 2004, the LEOFF Excess Payments, if any, were erroneously based on the current fire chief salary (for David McAllister) and current deputy chief salary (for Ken McAllister). CABR, HE 0562-63; CP 73, 75. This resulted in payments in excess of the statutory cap preserved under RCW 41.26.040(2) (i.e. the calculation required under RCW 41.18.060 and 41.18.010(4)). CP 73, 75.

On November 26, 2003, the Firemen's Pension Board voted unanimously to prospectively correct the error of the LEOFF Excess Payments to Appellants beginning January 2004 but not to collect overpayments made in the past years. CABR, HE 1532, 1543. On December 27, 2003, the McAllisters appealed the Board's decision of November 26, 2003. CP 133-136. An appeal hearing was conducted in front of a hearing examiner on September 14, 2004. CABR, HE 0349-0524. The hearing examiner recommended that the McAllisters' appeal be denied and that the correction in their pensions be left to stand. CP 137-140. On February 22, 2005, the Firemen's Pension Board adopted the recommendation of the hearing examiner. CP 28-33.

On February 24, 2005, the McAllisters filed an Application for Writ of Review as to the February 22, 2005 decision of the Firemen's Pension Board. CP 1-4. In that proceeding, the McAllisters claimed that the Board erred in its Finding of Fact No. 5:

5. LEOFF provided that any employee who made contributions under any prior act shall have his membership transferred to LEOFF, but for purposes of "credibility of service, eligibility for service, or disability retirement and survivor benefits, such employees shall also continue to be covered by the provisions of such prior act which relate thereto, as if the transfer of membership had not occurred."

CP 234. Appellants also argued generally that the Board had erred in its conclusions of law by not applying the LEOFF definition of "basic salary" to the LEOFF Excess Payment calculation. CP 235. Appellants pointed to no specific conclusion of law rendered by the Board with which they claimed error. CP 235. The trial court denied Appellants' Writ of Review. CP 303-304. (In addition at the trial court level, the McAllisters unsuccessfully claimed the Board violated their rights to due process and the appearance of fairness doctrine based on the composition of the Board. CP 11-23. The McAllisters have abandoned that argument on appeal.)

Now, the McAllisters contend in their brief before this court that the sixth conclusion of law of the Firemen's Pension Board was in error. Appellants claim the Board erred in finding that the LEOFF Act did not repeal the battalion chief cap on *basic salary* when determining the Excess

Calculation and Payment. The McAllisters also claim that the Board erred in not finding that *Bakenhus, supra*, applied to the situation. On appeal, the McAllisters continue to assert that LEOFF is constitutional but that the Pension Board's application of the LEOFF statute (presumably in calculating the LEOFF Excess Payment in compliance with RCW 41.18.010(4)) is unconstitutional. Appellants contend *Bakenhus, supra*, supports their position.

The Board maintains that both the 55 Act and LEOFF are constitutional and that it correctly applied the applicable statutory provisions in 2003 when it prospectively corrected the McAllisters' LEOFF Excess Payments.

V. ARGUMENT

A. Standard of Review.

The court of appeals stands in the same position as the superior court when reviewing an administrative decision. *Swoboda v. Town of La Conner*, 97 Wn.App. 613, 617, 987 P.2d 103 (1999), *review denied*, 140 Wn.2d 1014, 5 P.3d 9 (2000). The court of appeals reviews the examiner's factual findings under a substantial evidence standard and the examiner's conclusions of law de novo. *Bierman v. City of Spokane*, 90 Wn.App. 816, 821, 960 P.2d 434 (1998), *review denied*, 137 Wn.2d 1004, 972 P.2d 466 (1999). The substantial evidence standard is a deferential

standard which requires the court to view the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 115, 979 P.2d 387 (1999). Unchallenged findings of fact are considered to be verities on appeal. *Anderson v. Pierce County*, 86 Wn.App. 290, 307, 936 P.2d 432 (1997)(internal citations omitted).

B. The McAllisters Have Abandoned Any Claim Of Error On Appeal Since They Admit That LEOFF Is Constitutional.

The McAllisters have repeatedly stated that the provisions of LEOFF are constitutional. Appellants are not alleging that the enactment of LEOFF affected their contractual pension relationship with their employer, the City of Bellevue. Instead, Appellants are alleging that their interpretation of provisions of LEOFF must govern in order for the Pension Board to constitutionally calculate the LEOFF Excess Payment. Appellants are asking this court to create a designer retirement plan just for them. The McAllisters are asking this court to rewrite the LEOFF Excess Payment calculation to require that the calculation be made using LEOFF's definition of *basic salary* and not the definition provided by the 55 Act. Appellants are asking this court to ignore the clear language of the LEOFF Act and to allow them to have uncapped retirement benefits

under the Excess Payment Calculation of the LEOFF Act. The McAllisters have cited no legal authority that supports their request.

The McAllisters attempt to twist *Bakenhus, supra*, and its progeny to support their contention. *Bakenhus* is not applicable to Appellants' argument. *Bakenhus* and its progeny protect a public employee's pension in effect at the time of hire from later legislation that impairs vested rights. When the subsequent legislation substantially modifies the contractual relationship of the parties, the later legislation has been held to have impaired vested pension rights and thus is unconstitutional. In those instances where the later legislation has been held unconstitutional as applied to that employee, it has been held that the provisions or pension act in place prior to the amended legislation is applicable to the pension member. The rationale of *Bakenhus* does not apply to situations where the employee claims the newly enacted legislation is reasonable and equitable but simply that the legislature meant to accomplish something else.

Although the McAllisters rely on *Bakenhus*, they do not want the court to find constitutional defects with the LEOFF act because such would result in LEOFF being inapplicable to them. Appellants do not want all their retirement benefits defined by the 55 Act. The 55 Act caps the amount of retirement benefits to which Appellants are entitled at 50 percent of the basic salary of a battalion chief and does not provide the full

lifetime medical benefits and benefits for widows added by LEOFF in RCW 41.26.150 and 160.

If the McAllisters agree that the provisions of LEOFF are constitutional, then *Bakenhus* has no applicability to the facts. The Board applied the provisions of LEOFF, including the LEOFF Excess Payment, as provided by RCW 41.26.040(2) and RCW 41.18.060. The McAllisters' claim should not proceed any further.

C. Bellevue Constitutionally Applied RCW 41.26.040(2).

When LEOFF went into effect on March 1, 1970, it preserved the right of fire fighters who retire under LEOFF, but who had contributed to a local firemen's pension fund before March 1, 1970, to obtain a monthly pension that would be no less than the amount of a pension the fire fighter would have received under RCW 41.18 had LEOFF had not been enacted.

This was accomplished through RCW 41.26.040(2):

(2) Any employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. **In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had not transferred.** For the purpose of such computations, the employee's creditability of service and eligibility for service or

disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred. The excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this chapter shall be paid whether or not the employee has made application under the prior act. If the employee's prior retirement system was the Washington public employees' retirement system, payment of such excess shall be made by that system; if the employee's prior retirement system was the statewide city employees' retirement system, payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred: PROVIDED, That any death in line of duty lump sum benefit payment shall continue to be the obligation of that system as provided in RCW 41.44.210; in the case of all other prior retirement systems, payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred. (Emphasis added)

The McAllisters contributed to the 55 Act prior to March 1, 1970.

Therefore, the McAllisters are entitled to a retirement calculation based on the provisions of the 55 Act. RCW 41.18.060 and RCW 41.18.010(4) describe the retirement calculation for a disability retiree under the 55 Act.

RCW 41.18.060 provides in relevant part:

“...If the board finds at the expiration of six months that the fire fighter is unable to return to and perform his or her duties, the fire fighter shall be retired at a monthly sum equal to **fifty percent of the amount of his or her basic salary** at any time thereafter attached to the rank which he or she held at the date of retirement.

RCW 41.18.010(4) defines basic salary:

“(4) "Basic salary" means the basic monthly salary, including longevity pay, attached to the rank held by the retired fireman at the date of his retirement, without regard to extra compensation which such fireman may have received for special duties assignments not acquired through civil service examination: **PROVIDED, That such basic salary shall not be deemed to exceed the salary of a battalion chief.**

The Board's calculation of the pension benefit for a fire fighter who contributed to the Firemen's Pension Fund (55 Act) did not change after the enactment of LEOFF. RCW 41.26.040(2) retained the Board's obligation to determine what a LEOFF retiree, who contributed to the Firemen's Pension Fund, would have received under the 55 Act. The only difference is that after LEOFF, the Board was only obligated to pay the LEOFF retiree from the Fund the difference between the state paid LEOFF pension and the greater amount, if any, the fire fighter would have received under the 55 Act. This is LEOFF Excess Payment.

The McAllisters seek to avoid this clear reading of the statutes by arguing that *Bakenhus* requires that the Board calculate the McAllisters' LEOFF Excess Payment ignoring the battalion chief salary cap in RCW 41.18.010(4) because the McAllisters (constitutionally) **contributed to the LEOFF pension fund** an amount that was not capped at the battalion chief salary. There is no dispute that each act provided a symmetry between contributions and benefits. While members of the 55 Act, the

McAllisters contributed to the 55 Act pension fund at 6 percent of the battalion chief salary. If they had retired under the 55 Act, the McAllisters would have been entitled to benefits capped at the level of battalion chief. RCW 41.18.010(4); RCW 41.18.030; RCW 41.18.060. The McAllisters' LEOFF pension contributions were based on a percentage of Appellants' salaries, up to their ranks at the time, and correspondingly, the McAllisters' benefits under LEOFF were based on the final average compensation of their highest rank held, up to and including fire chief. RCW 41.26.080(2); RCW 41.26.030(13)(a); RCW 41.26.420. *Bakenhus* does not provide the analysis or remedy that the McAllisters seek.

The McAllisters rely on *Bakenhus* and a version of LEOFF that never went into effect to support their argument. Appellants' argument is deficient because LEOFF's removal of the battalion chief salary cap on both contributions and benefits in providing a state paid LEOFF pension does not violate *Bakenhus*. Second, if LEOFF's removal of the battalion chief salary cap on contributions and benefits under LEOFF is a violation of *Bakenhus* the remedy would not be for the Board to pay a greater pension than is provided for under RCW 41.18. If the LEOFF Excess Payment provisions of RCW 41.26.040(2) violate *Bakenhus*, then the provisions of the 55 Act apply to Appellants. The McAllisters' pension rights are governed by the latest act which constitutionally applied to

them. *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 333 P.2d 642 (1958). Third, a statute that was amended before it went into effect does not alter the McAllisters' pension rights.

D. *Bakenhus* Does Not Create An Obligation On The Board To Pay A Higher Pension Than Is Required Under the 55 Act.

Bakenhus, 48 Wn.2d 695, sets forth the constitutional standard public agencies must meet in modifying a pension plan. *Bakenhus* provides that pension rights may be modified for the purpose of keeping the pension system flexible and maintaining its integrity. *Id.* at 701. However, amendments to pension rights will be constitutionally valid if they are reasonable and equitable. *Dailey v. City of Seattle*, 54 Wn.2d 733, 740, 344 P.2d 718 (1959). Subsequent to *Bakenhus*, courts have addressed the parameters of its holding and examined whether changes in a pension plan which result in a disadvantage to the employee are accompanied by comparable new advantage.

Two years after *Bakenhus*, the Washington Supreme Court evaluated the constitutionality of the 1935 amendments to the firemen's pension act which imposed a \$125 cap on the maximum allowable pension of the respondent retirees. See *Eisenbacher*, 53 Wn.2d at 284. Eisenbacher and his fellow respondents were receiving \$125 per month, or the maximum pension amount allowed under the 1935 act, but these

pensions would have been higher amounts if computed under the statute as it existed prior to the 1935 amendment. The court concluded that as a whole, the 1935 amendment was “clearly detrimental as applied” to the retirees and the retirees’ widows and concluded that the fire fighters were entitled to the benefits provided by the previous act. *Id.* at 285.

In *Dailey*, 54 Wn.2d 733, Captain Dailey’s pension was decreased from \$260 per month under the 1915 act to \$232.50 per month under the 1955 act, even though his payroll deduction also went up, from 2 percent to 4 ½ percent. The Washington Supreme Court found that the “detrimental limitation” of the maximum pension available to Dailey under the 1955 act outweighed the additional benefits of the 1955 act, which included an absolute right to retire after 25 years of service, elimination of the requirement that the retiree remain in Washington state, and the elimination of the requirement that the retiree die of “natural causes.” *Id.* at 740-41. The court did state, however, that the 1955 act was not necessarily similarly inequitable and unreasonable for many police officers who would be able to avail themselves to the new benefits which Dailey could not. *Id.* at 742. Thus, the increased contribution rate was not definitive in the court’s holding that the 55 Act was unconstitutional as applied to Dailey.

In another example of a case applying *Bakenhus*, the lowering of the mandatory retirement age after an employee commenced public service was invalidated because her potential pension was decreased from 28 percent to 18 percent of her average final compensation. *Eagan v. Spellman*, 90 Wn.2d 248, 581 P.2d 1038 (1978).

Public employees were held to have been unconstitutionally impaired by a new statute that prevented the inclusion of the value of accrued vacation time in computing their pension amount because this led to a reduction in the potential pension amount and the statute did not provide for counterbalancing benefits. The statute was held inapplicable to these employees. *Washington Fed'n of State Employees v. State*, 98 Wn.2d 677, 658 P.2d 634 (1983).

The common thread in the aforementioned cases is that, one way or another, the actual amount of the retirees' pension was reduced by the amendments, and there were no or insufficient benefits to make up for this loss. In the case at hand, LEOFF suffers no similar infirmity because the LEOFF Excess Payment ensures that there is no reduction in the total pension amount received by the McAllisters as compared to what they would have received under the 55 Act. Even if *Bakenhus* or its progeny applied to this case, it does not mandate the outcome desired by the Appellants. The remedy would be to hold the LEOFF act unconstitutional

as it applied to the McAllisters, leaving the McAllisters' disability benefits to be calculated solely under the terms of the 55 Act at 50 percent of the battalion chief cap. The McAllisters do not want this remedy because it lowers their total disability benefits.

Bakenhus and its progeny do not stand for the proposition that the courts may modify the statutory language of pension plans, as the McAllisters seem to argue. *Bakenhus* does not support the McAllisters' contention that the definition of *basic salary* provided by LEOFF be substituted for the definition of *basic salary* provided in the 55 Act. If the legislative changes of the new LEOFF statute meet the standards of *Bakenhus*, the statutory changes are valid. The McAllisters have cited no authority for their contention that the court may graft sections of one statute onto another to create a designer retirement program for them.

E. The LEOFF Legislation Passed In 1969 But Amended Before Its Enactment On March 1, 1970 Does Not Alter the McAllisters' Benefit Calculation Under The LEOFF Excess Payment.

The McAllisters allege that the LEOFF act specifically preserved all rights and benefits of the 55 Act and gave Appellants, who had contributed to both acts, the choice to elect benefits under LEOFF or the 55 Act upon retirement. Appellants are incorrect. As of March 1, 1970, Appellants were members of **only one** pension plan, LEOFF. RCW

41.26.040 (1). After March 1, 1970, Appellants contributed to only **one** pension plan. However, having contributed to both pension plans at some point over the years, LEOFF provided that Appellants were entitled to an Excess Calculation and potentially an Excess Payment utilizing the former pension calculation provided under the 55 Act. RCW 41.26.040(2).

The McAllisters allege that the “original” language of RCW 41.26.040(2) guaranteed that the McAllisters’ contribution rate (i.e., 6 percent of their basic salary as defined by the 55 Act) would remain unchanged with the conversion to LEOFF on March 1, 1970. The McAllisters allege that somehow this “original” language of RCW 41.26.040(2) as to employee **contribution rates** makes it clear that the Legislature intended not to alter either the contribution rates or the benefits of any fire fighters once members of the 55 Pension Act. The logic and analysis offered by the McAllisters is erroneous.

In 1969, Substitute Senate Bill No. 74 (Chapter 209, Laws of 1969, Ex.) was introduced to create an actuarial reserve system for retirement, disability and death benefits for all law enforcement officer and fire fighters. CP 267-274. The Washington Law Enforcement Officers and Fire Fighters (“LEOFF”) retirement system, RCW 41.26, was created with this legislation. RCW 41.26.040.

The first version of RCW 41.26.040 was enacted on July 1, 1969,

it read, in pertinent part, as follows:

The Washington law enforcement officers' and fire fighters' retirement system is hereby created for the fire fighters, policemen, deputy sheriffs, sheriffs, and town marshals.

(1) All fire fighters, policemen, deputy sheriffs, sheriffs and town marshals initially employed in that capacity on or after March 1, 1970, on a full time basis in this state shall be members of the retirement system established by this 1969 amendatory act, to the exclusion of any pension system existing under any prior act.

(2) Any employee who has made retirement contributions under any prior act shall have his membership transferred to the system established by this 1969 amendatory act **on March 1, 1970**: PROVIDED, HOWEVER, That for purposes of employee contribution rate, creditability of service, eligibility for service or disability retirement, and survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this act shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had continued to be a member of the retirement system covered thereby and these benefits, including survivor's benefits, offset by all benefits payable under this act, shall be paid to him by the county, city, town or district by which he was employed at the time of his retirement.

... (*Laws Ex. Sess.*, Ch. 209 § 4 (1969))

CP 268-269. However, **before the effective date** of this new legislation (March 1, 1970) a house bill was introduced to clarify the language of this statute.

A new version of RCW 41.26.040 was enacted on **February 12, 1970**. CP 275-282. The original version of the statute enacted in 1969 and cited by the McAllisters, never went into effect. The revised version, adopted on February 12, 1970, was in place when the LEOFF retirement system took effect on March 1, 1970 and when all 55 Act memberships were transferred to the LEOFF system. The language of the statute was amended on February 12, 1970, to read as follows:

The Washington law enforcement officers' and fire fighters' retirement system is hereby created for the fire fighters (~~(,policemen, deputy sheriffs, sheriffs, and town marshals)~~) and law enforcement officers.

(1) All fire fighters (~~(,policemen, deputy sheriffs, sheriffs, and town marshals initially)~~) and law enforcement officers employed (~~(in that capacity)~~) on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act except as provided in subsection (2) of this section.

(2) Any employee -serving as a law enforcement officer or fire fighter on March 1, 1970, who (~~(has made)~~) is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter (~~(on March 1, 1970: PROVIDED, HOWEVER, That for purposes of employee contribution rate, creditability of service, eligibility for service or disability retirement, and~~

~~survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred))~~ as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this act shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had ~~((continued to be a member of the retirement system covered thereby and these benefits, including survivor's benefits, offset by all benefits payable under this act, shall be paid to him by the county, city, town or district by which he was employed at the time of his retirement))~~ not transferred. For the purpose of such computations, the employee's credibility of service and eligibility for service or disability retirement and survivor and other benefits shall continue to be provided in such prior retirement act, as if transfer of membership had not occurred. The excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this 1970 amendatory act shall be paid. If the employee's prior retirement system was the Washington public employee's retirement system, payment of such excess shall be made by that system; if the employee's prior retirement system was the state-wide city employees' retirement system, payment of such excess shall be made by the employer which was the members' employer when his transfer of membership occurred: PROVIDED, That any death in line of duty lump sum benefit payment shall continue to be the obligation of that system as provided in RCW 41.44.210; in the case of all other prior retirement systems, payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred.

... (Laws Ex. Sess., Ch. 6 § 2 (1970))

CP 276-277. The current version of RCW 41.26.040 has been modified but the language at issue in RCW 41.26.040(2) remains the same. Neither the 1970 nor the current version of RCW 41.26.040 make any reference to the “employee contribution rates.”

As set forth above, the first version of LEOFF was adopted on July 1, 1969. It clearly stated that the new retirement system (LEOFF) did not become effective **until March 1, 1970**. No fire fighter could have had his retirement membership transferred to the new system until March 1, 1970. The “contribution rate” language upon which the McAllisters now rely **was not** in RCW 41.26.040(2) when their rights in the new LEOFF system became effective on March 1, 1970.

When the 1969 and 1970 versions of RCW 41.26.040 are compared, it is obvious that the Legislature saw the overall problems with implementing the transfer of membership under the 1969 version. The 1970 version more clearly gives guidance as to the transfer of membership process and the calculations for Excess Payments. However, the intent of both versions remained the same – to insure the same benefits to those individuals with prior membership under another pension system.

The McAllisters have cited no authority for their contention that they have vested rights based on a version of a statute which never took effect. There is no authority to support their contention. The McAllisters’

pension rights under LEOFF became vested when their rights were transferred to the new system on March 1, 1970. It was the language of RCW 41.26.040 in place on March 1, 1970 which provided the McAllisters with rights under the LEOFF system. Under the McAllisters' argument, a 55 Act pensioner who retired after July 1, 1969, but before March 1, 1970 would be entitled to LEOFF membership and benefits. That is an illogical argument.

The statute is clear and unambiguous in its language that mandated a transfer of pension membership on March 1, 1970. The Court need not look beyond the language of the statute to conclude that no new rights or benefits were created until March 1, 1970. See *Everett Concrete Prods., v. Dept. of Labor & Indus.*, 109 Wn.2d 819, 748 P.2d 1112 (1988). Furthermore, in *Mulholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974), the Washington Supreme Court looked at the intent of the Legislature in creating LEOFF. The Supreme Court recognized that the Legislature made a specific attempt to preserve all the benefits provided by the retirement acts existing prior to LEOFF and cited to the version of RCW 41.26.040(2) that was adopted on February 12, 1970:

...
For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and other benefits shall

continue to be provided in such prior retirement act, as if transfer of membership had not occurred.

Id. at 1158. No court has cited to the version of RCW 4.26.040 enacted on July 1, 1969 as authoritative as to the issue at hand.

The language of LEOFF providing for the Excess Payment is susceptible to only one reasonable meaning and interpretation. The basic rule of statutory construction is that when the language of a statute is clear and unambiguous, there is no room for judicial interpretation. *Roza Irrigation Dist. v. State*, 80 Wn.2d 633, 634, 497 P.2d 166 (1972). The only reasonable meaning and interpretation of this statute is that for purposes of the LEOFF Excess Payment, the computation shall be made as if Appellants had not transferred from the 55 Act. That means that the language and definitions of the 55 Act are to be used for the calculation.

Even when ambiguous statutory language exists, the courts interpret the ambiguous statute so as to affect the intent of the Legislature within the context of the entire statute. The courts look at the Legislature's intent within the statute as a whole and seek to avoid strained, unlikely or unrealistic consequences. *Davis v. Department of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

If the Legislature had intended for the LEOFF definition of *basic salary*, RCW 41.26.030(13)(a), to apply to those fire fighters who had

previously been 55 Act members, the Legislature could have easily included such reference or language. It is clear that the Legislature intended to create a brand new retirement plan with the enactment of LEOFF. It is also clear that the Legislature wanted to insure that fire fighters who had previously been members of the 55 Act did not lose any retirement benefits that may have been provided to them under the 55 Act. That was accomplished with the language of RCW 41.26.040 through the LEOFF Excess Payment.

The McAllisters' attempt to graft LEOFF's definition of *basic salary* into the Excess Payment calculation provided by RCW 41.26.040(2) is illogical and without merit.

F. The Provisions Of The 55 Act And LEOFF Are Not Inconsistent.

The McAllisters incorrectly claim that for ranks above battalion chief, the LEOFF definition of *basic salary* are not consistent with the prior 55 Act and that the two acts are not reconcilable. Appellants cannot make this argument while at the same time claiming that LEOFF is constitutional. If LEOFF is constitutional, then by definition the *Bakenhus* standard for a modification to the LEOFF pension plan has been met as described above. There is no merit to the McAllisters' claims that an inconsistency exists between the 55 Act and LEOFF which requires the

Board to pay the McAllisters more than the formula under RCW 41.18.060. Further, since LEOFF and the 55 Act were never in effect at the same time, reconciliation is not necessary.

Each act (55 Act and LEOFF) provides for different contribution rates and a different calculation of retirement benefits. Each act provides all the definitions necessary to make the contributions and payment calculations as each act provides. Calculations under each act are made independent of the other. Both the LEOFF retirement calculation and the LEOFF Excess Payment (which relies on provisions set forth in the 55 Act) can be calculated without relying on the other.

Appellants cite no authority for their contention that to calculate the LEOFF Excess Payment using the 55 Act, the Board must rely on the LEOFF definition of *basic salary*. There is no inconsistency with the definitions of *basic salary* as set forth between LEOFF and the 55 Act. Each act provides its own definition of *basic salary*. Each act applies the definition of *basic salary* consistently throughout its statutory provisions.

For those limited retirees who contributed to the 55 Act and later retired under the provisions LEOFF, they are entitled to an Excess Calculation and Payment based on the provisions and definitions of the 55 Act. Such a calculation can be made under the provisions of the 55 Act by relying solely on the definition of *basic salary* provided by the 55 Act.

There is no need to graft the LEOFF definition of *basic salary* onto the provisions of the 55 Act. The McAllisters have provided no authority to support the request for this custom grafting.

The McAllisters' reliance on RCW 41.26.910 (now RCW 41.26.3902) is unfounded. This statutory language simply provides that if there are inconsistencies between the provisions of the amendatory act (LEOFF) and the provisions of any other law, the provisions of LEOFF shall control. There are no inconsistencies with the *basic salary* definition provided by LEOFF and any other law. The *basic salary* definition provided by LEOFF in RCW 41.26.030(13) is the new *basic salary* definition to be applied to all those who became members of LEOFF on March 1, 1970. It **replaced** any definitions of *basic salary* that may have existed under any prior acts.

VI. CONCLUSION

The McAllisters had their pension membership transferred to Law Enforcement Officers and Fire Fighters Retirement System (LEOFF), as enacted by RCW 41.26.040, on March 1, 1970. After that date, the McAllisters were no longer members of the 1955 Firemen's Pension Act (55 Act).

LEOFF provides a clear and unambiguous statutory scheme for contributions and benefits. LEOFF provides its members with more

benefits than previously provided to members of the 55 Pension Act. LEOFF also eliminated any cap on contributions. A clear symmetry exists between contributions and benefits. Under the analysis of *Bakenhus*, LEOFF is constitutional. Appellants do not dispute the constitutionality of LEOFF.

The City of Bellevue Firemen's Pension Board appropriately applied the provisions of LEOFF when it entered its Order on February 22, 2005. The Board correctly calculated the Excess Payment benefit to which the McAllisters were entitled under the provisions of RCW 41.26.040(2). The statutory language of RCW 41.26.040(2) requires that the Pension Board utilize the terms and conditions of the 55 Act to calculate the Excess Payment benefit. The Board utilized the definition *basic salary* as provided by the 55 Act and correctly capped the McAllisters' Excess Payments at the salary of a battalion chief.

The McAllisters have provided no authority for their contention that they are entitled to continued payments of a pension in excess of statutorily defined limits. The Court should affirm the decision of the

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Superior Court in denying Appellants' Writ of Review.

DATED this 25 day of August, 2006.

OFFICE OF THE CITY ATTORNEY
CITY OF BELLEVUE
Lori M. Riordan, City Attorney

By



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WSBA # 15906
Assistant City Attorney
For Defendant City of Bellevue
Firemen's Pension Board

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DAVID McALLISTER and KEN
McALLISTER

Appellants,

vs.

CITY OF BELLEVUE FIREMEN'S
PENSION BOARD,

Respondent.

COA # 57869-3-I

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 AUG 28 PM 3:38

THE UNDERSIGNED hereby certifies that on this date, I cause service of the **RESPONSE BRIEF OF CITY OF BELLEVUE FIREMEN'S PENSION BOARD** and **CERTIFICATE OF SERVICE** in the above-referenced case by having the originals filed with the Court of Appeals, Appellate Court Clerk and a copy delivered via legal messenger to the following:

HANS JOHNSON, ESQ.
10655 NE Fourth Street, Suite 312
Bellevue, WA 98004

I DECLARE UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT.

DATED this 25 day of August, 2006.


Sharon Taylor